COMMONWEALTH OF MASSACHUSETTS

**SUPREME JUDICIAL COURT for SUFFOLK COUNTY**

No. _____

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NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.

Appellant,

v.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY,

Appellee.

_____

ON APPEAL FROM A RULING OF LAW BY THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

_____

PETITION FOR APPEAL PURSUANT TO G.L. c. 25, § 5

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The New England Public Communications Council, Inc., ("NEPCC") hereby appeals from the order issued by the Department of Telecommunications and Energy (the "Department") on June 23, 2004, in Docket numbered D.P.U./D.T.E. 97-88/97-18 (Phase II) (the "*Phase II Order*"). This appeal is brought pursuant to G.L. c. 25, § 5. A copy of the Department's *Phase II Order* is attached hereto as Exhibit A.

**Issues On Appeal**

1. The issues that the NEPCC raises on appeal are as follows:

   a. Whether the Department, having directed Verizon-Massachusetts ("Verizon") to revise its tariffed intrastate rates for Public Access Line ("PAL") service used by independent payphone service providers ("PSP") so that those rates would comply with the requirements of Section 276 of the Communications Act of 1934, as amended (the

"Act"), and the implementing orders of the Federal Communications Commission ("FCC"), erred as a matter of Federal law in refusing to require Verizon to refund the difference between the rates established pursuant to the *Phase II Order* and the previously effective PAL rates?

b. Whether the *Phase II Order's* denial of such refunds constitutes an illegal taking of property rights of the affected PSPs in violation of law?

c. Whether the *Phase II Order's* rationale for denial of such refunds satisfies the established requirements for reasoned decision-making and is otherwise arbitrary, capricious and unreasonable and not in accordance with applicable law?

**Federal Legal Background**

2. This appeal involves the Department's interpretation and application of a Federal statute – 47 U.S.C. §276 – and the relevant directives of the responsible Federal agency – the FCC – in implementing the requirements of that law. This Court is familiar with Section 276 of the Act, which was adopted as part of the federal Telecommunications Act of 1996.[1] As this Court previously recognized, a principal stated purpose of Section 276 was, among other things, "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."[2] In addition, the focus of the FCC implementing actions "was the fostering of fair competition in the provision of payphone service. . . ."[3] The appellant NEPCC is a trade association whose PSP members both compete with Verizon in the provision of those services and at the same time are Verizon

[1] *See MCI Telecommunications Corporation v. Department of Telecommunications & Energy*, 435 Mass. 144 (2001) ("*MCI Decision").*
[2] *MCI Decision*, at p. 152, *citing* 47 U.S.C. §276(b)(1).
[3] *Id*., at p. 153.

customers. Such PSPs were the principal intended beneficiaries of the requirements of Section 276.

3. In addition to prohibiting Verizon from cross-subsidization of its own payphone services,[4] Section 276, among other things, required the FCC to adopt regulations to "prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement" other requirements of Section 276, "which safeguards shall, at a minimum, include the non-structural safeguards equal to those adopted in the [FCC's] Computer Inquiry – III . . . proceeding." As the Department properly found in the *Phase II Order*, the series of rulings that the FCC issued to implement the Federal statutory mandates of Section 276 included a requirement that "rates for [local exchange carriers' ("LECs)"] wholesale payphone services be: (1) cost-based; (2) consistent with the requirements of Section 276 . . .; (3) non-discriminatory; and (4) consistent with the FCC's Computer III tariffing guidelines, including the FCC's 'new services test.'"[5]

4. The FCC assigned to state commissions, such as the Department, the initial determination of whether the LECs had met this and other requirements of Section 276 and the *Payphone Orders*. However, the FCC expressly retained jurisdiction over these compliance issues.

[4] This Court dealt with that requirement in the *MCI Decision*.

[5] *Phase II Order*, at p. 3 (citations omitted). Computer III was an FCC proceeding in which certain service costing requirements were established. The Court discussed the requirements of one or more of these FCC implementing orders in the MCI Decision. *See e.g., MCI Decision,* at p. 153. The relevant FCC orders and judicial decisions that have addressed the implementation of Section 276 are as follows: *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, *First Report and Order*, 11 FCC Rcd. 20541 (1996); *Order On Reconsideration*, 11 FCC Rcd. 21233 (1996), *aff'd in part and remanded in part sub nom*., *Ill. Public Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C.Cir. 1997); *First Clarification Order*, 12 FCC Rcd. 20997 (Com. Car Bur. 1997); *Second Clarification Order*, 12 FCC Rcd. 21370 (Comm. Car. Bur. 1997); *Second Report and Order*, 13 FCC Rcd. 1778 (1997), *aff'd in part and remanded in part sub nom*., *MCI Telecomms. Corp v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Third Report and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd. 2545 (1999), *aff'd, American Public Communications Council, Inc. v FCC*, 215 F.3d 51 (D.C. Cir. 2000); *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 15 FCC Rcd. 9978 (Com. Car. Bur. 2000) ("*Wisconsin I*"), *aff'd in part, Memorandum Opinion and Order*, 17 FCC Rcd. 2051 (2002) ("*Wisconsin II*"), *aff'd, New England Public Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003)(unless individually referred to, hereinafter referred to collectively as the "*Payphone Orders*").

Moreover, Section 276 specifically provided that any state actions or requirements that were found to be inconsistent with the *Payphone Orders* were preempted.[6]

5. As the Department also conceded, and this Court previously noted, the FCC required that tariffed intrastate payphone access rates complying with Section 276 and that agency's implementing orders were to be effective by no later than April 15, 1997.[7] The FCC required this as a precondition to Verizon and other LECs also benefiting from the right to receive compensation on certain calls made from their payphones, as required by Congress in Section 276 (b)(1)(A) and implemented by the FCC ("dial-around compensation"). Indeed, the FCC stated this very explicitly.

> Accordingly, we conclude that LECs will be eligible for compensation like the other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276.[8]

6. The FCC , through its Common Carrier Bureau, subsequently reconfirmed that this requirement applied to with respect to intrastate payphone tariffs like those at issue in the *Phase II Order*.

> We emphasize that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived herein, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. Both independent PSPs and [interexchange carriers ("IXCs")] claim that some LECs have not filed state tariffs that comply with the requirements set forth in the Order on Reconsideration. These requirements are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, and non-discriminatory; and (2) that the states ensure that payphone costs for unregulated equipment and subsidies be removed from the intrastate local exchange service and exchange access service rates. LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone

[6] 47 U.S.C. §276(c).
[7] *Phase II Order*, at pp. 4-5; *see MCI Decision*, at p. 153.
[8] *Order On Reconsideration*, at ¶131. The FCC specifically stated that "a LEC must be able to certify" such compliance. *Id.*

> operations of the LECs to be eligible to receive payphone compensation . . . , LECs that have not complied with these requirements will not be entitled to receive compensation.[9]

7. This reminder precipitated a further request by Verizon and other LECs specifically for more time to meet the intrastate tariff compliance requirement, without delaying receipt of dial-around compensation.[10] In doing so, Verizon and its colleagues conceded that the then extant *Payphone Orders* "mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that the requisite cost-support data must be submitted to the individual states."[11] As a further incentive for the Commission to provide them with additional time, the requesting LECs voluntarily committed "to reimburse or provide credit to those purchasing the services back to April 15, 1997 . . . to the extent that the new tariff rates are lower than the existing ones."[12] Based on these representations, the Commission granted all LECs an additional 45 days (i.e., until May 19, 1997) to bring their intrastate tariffs into compliance with the Commission's rules, but still allowed them to begin to collect dial-around compensation as of April 15, 1997.[13]

8. The FCC did not require the filing of additional, new tariffs by Verizon and its colleagues to ensure compliance of their intrastate payphone access rates by the deadline. They could choose to rely on their existing rates, as Verizon did for its PAL service, subject to certifying them as required. However, these existing tariffs were still subject to review by the relevant state commission for compliance with the FCC's directives.

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[9] *First Clarification Order*, at ¶30. In the same *Order*, the Bureau later reiterated that the tariffs must be consistent with Computer III guidelines (i.e., new services test) as well. *Id.*, at ¶31.
[10] *Second Classification Order*, at ¶13, n. 31.
[11] *Second Clarification Order*, at ¶18. The requesting LECs also indicated that they would take "whatever action is necessary to comply with the Commission's orders in order to be eligible to receive payphone compensation at the earliest possible date. *Id.*
[12] *Second Clarification Order*, at ¶14 and n. 40, quoting *Ex Parte* Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997).
[13] *Second Clarification Order*, at ¶25.

> In the Order on Reconsideration, the Commission concluded that where the LECs already filed intrastate tariffs for payphone services, states may, *after considering the requirements* of the Order on Reconsideration, the Payphone Order, and Section 276, conclude: (1) that existing tariffs are consistent with the requirements of the Payphone Order, as revised in the Order On Reconsideration, and (2) that in such case no further filings are required.[14]

9. As other state commissions began to apply and interpret these requirements, the FCC was called upon to provide confirmation and further guidance as to the requirements of Section 276 and the *Payphone Orders*. The FCC did so in two decisions addressing issues raised by PSPs from Wisconsin, the latter of which was affirmed by the United States Court of Appeals for the District of Columbia Circuit.[15]

**Procedural History At Department Leading To *Phase II Order***

9. The lengthy procedural history of this proceeding at the Department is outlined in the first 12 pages of the *Phase II Order*. The Department commenced Phase II of Docket 97-19/97-88 in December 1997. It did so by seeking to determine whether Verizon's then current tariffed intrastate payphone access rates were in compliance with the requirements of Section 276 as reflected in the then extant *Payphone Orders.*[16] Substantial discovery, two hearings and multiple briefings ensued over the succeeding six and one-half years of the proceeding. In the meantime, with minor periodic adjustments to certain components of its payphone access rates, there is no dispute that the rates certified by Verizon in 1997 as being in compliance with the FCC requirements remained in place and Verizon took advantage of its right to collect dial-around compensation on calls from its payphones.

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[14] *Second Clarification Order,* at ¶8 (emphasis supplied).
[15] *See, supra,* n. 5, *Wisconsin I* and *Wisconsin II.*
[16] *Phase II Order*, at p. 5. The Department sought comment on the then tariffed rates for PAL Services, which are used primarily by PSPs, and Public Access Smart-Pay Line ("PASL") services, which are used primarily by Verizon's own payphone operations. Among other requirements of Section 276 and the *Payphone Orders* was that Verizon tariff PASL services so PSPs could use them if they so desired.

## The *Phase II Order's* Findings On Payphone Access Rates

10. The Department introduces the *Phase II Order* by stating that it "concerns the requirements for pricing wholesale payphone access services under the Telecommunications Act of 1996…and the applicable rules of the Federal Communications Commission."[17] Throughout the proceeding Verizon steadfastly maintains that its current rates for both PAL and PASL services, including the components unchanged since 1997, satisfy "all FCC requirements."[18]

11. However, the Department unequivocally rejects Verizon's contention in that regard. Instead, it focuses on whether revised rates that Verizon was directed to submit for payphone access services "comply with the FCC's Payphone Orders."[19] In the end, the Department concludes that it is only after implementation of these revised charges, when adjusted as directed in the *Phase II Order*, that Verizon's payphone access rates will then "be in compliance…with FCC requirements for payphone access line rates."[20] It directs Verizon to file a compliance tariff reflecting the new rates, which generally reflect reductions over the current Verizon charges, within two weeks of the date of the *Phase II Order.*

## The *Phase II Order's* Findings On Refunds

12. Having spent the bulk of its decision to arrive at the conclusion that Verizon's existing payphone access rates must be adjusted to comply with the long-standing FCC requirements, the *Phase II Order* then rejects any requirement that Verizon refund the difference between the newly–compliant rates and the non-compliant rates that have been in effect since before this Phase II began over six and one-half years ago. In four pages of tortured and inconsistent logic, the Department apparently reasons that no refunds are required by the Federal regime reflected in

[17] *Phase II Order*, at p. 1.
[18] *See e.g., Phase II Order*, at p. 13, n. 14.
[19] *Phase II Order*, at pp. 9-10
[20] *Phase II Order*, at p. 30.

Section 276 and the *Payphone Orders* in this case because (a) the Department's prior failure to ever explicitly state that they would be, (b) although the *Phase II Order* directed that Verizon's current rates be adjusted to bring them into compliance with the Federal regime, that does not mean that the Department has found that the former rates were non-compliant and (c) the FCC exempted any LEC like Verizon that certified its existing payphone access rates or did not file a tariff for new intrastate services within the extended time period granted by the FCC, from any obligation to make any refund if the Department subsequently directed that the rates be adjusted to comply with Section 276 and the *Payphone Orders*.

**Claim of Error**

13. The NEPCC claims that the Department erred as a matter of Federal law in denying refunds to those PSPs who have paid rates that the Department has found must now be adjusted to meet the requirements of Section 276 and the *Payphone Orders*. Such refunds are required under the terms of the statutory regime administered by the FCC. Any inconsistent state requirements are, as a matter of Federal law, automatically preempted by Section 276(c) of the Act. The Department's narrow interpretation of the FCC decisions relevant to the refund issue are incorrect as a matter of law. Indeed, in light of the denial of refunds, the Department has, in effect, permitted Verizon, through the continued receipt of dial-around compensation during the pendency of the proceeding resulting in the *Phase II Order*, to subsidize its payphone operations in violation of Section 276 and the *Payphone Orders*. Further, the denial of refunds constitutes an illegal taking of the property rights of the affected PSPs in violation of law. Finally, the Department's inconsistent analysis of the refund issue is arbitrary, capricious and unreasonable and fails to constitute reasoned decision making.

**WHEREFORE**, the NEPCC prays that this Honorable Court find that the Department's decision on refunds in the *Phase II Order* was in error and direct Verizon to refund the difference between the newly FCC-compliant rates approved by the Department and the former rates, with a reasonable level of interest for the over seven years that they have been illegally in effect.

Respectfully submitted,

**NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.**

By /s/ James M Avery_____
James M. Avery (BBO No. 542672)
Wayne F. Dennison (BBO No. 558879)
Brown Rudnick Berlack Israels LLP
One Financial Center
Boston, Massachusetts 02111
(617) 856-8200

By /s/ Paul C. Besozzi_____
Paul C. Besozzi
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-5292

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## Request for Reservation and Report

For the reasons stated in the accompanying motion, NEPCC requests that the Single Justice of the Supreme Judicial Court, Suffolk County, without deciding this matter, reserve for and report to the full Supreme Judicial Court the questions of law raised by this appeal.